

**No. SC86365**

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**IN THE MISSOURI SUPREME COURT**

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**STATE ex rel. FORD MOTOR COMPANY**

**Relator,**

**v.**

**THE HONORABLE W. STEPHEN NIXON,  
Circuit Judge, Jackson County, Missouri, Division 5**

**Respondent.**

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**RELATOR'S BRIEF**

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## **PRELIMINARY STATEMENT**

The law in Missouri is simple and clear: (1) the Labor and Industrial Relations Commission (“LIRC”) has exclusive jurisdiction of workplace injury claims; and, (2) discovery must be reasonably limited to the products and issues in the case. See State ex rel. McDonnell Douglas Corp. v. Ryan, 745 S.W.2d 152, 154 (Mo. banc 1988) (exclusive jurisdiction); State ex rel. Ford Motor Co. v. Messina, 71 S.W.3d 602, 607 (Mo. banc 2002) (discovery limited to products at issue).

Respondent did not follow the controlling law. As a consequence Ford Motor Company (“Ford”) is faced with a burden, even if possible to meet, of thousands of hours and millions of dollars. Accordingly, the Preliminary Writ issued by this Court on November 23, 2004, should be made absolute; to wit, Respondent’s September 6 and 7, 2004, discovery orders (“Discovery Orders”) should be ordered vacated and Respondent should be directed to enter a protective order “limiting discovery to those matters not already discovered and that are relevant to the issues in [the case].” Exhibit A.

This case is the third of three separate claims filed in three separate forums by Plaintiffs and their counsel: first, Plaintiffs filed a suit in federal court against the manufacturers, sellers, distributors and installers of asbestos and asbestos-containing products (including “John Does 1-20) at Roy L. Dietiker’s place of work – the Ford Claycomo facility (“Federal Action”); second, they filed a workers’ compensation claim against Ford for Mr. Dietiker’s injuries resulting from alleged exposure to asbestos at work (“Workers’ Compensation Claim”); and, third, Plaintiffs commenced this state court action against Ford, F.X. Scott (a Ford employee) and “John Does 1-20” for alleged exposure to

asbestos at Mr. Dietiker's place of work and outside of work through the purchase and installation of replacement brake pads on six vehicles ("State Court Action"). All three claims are pending and, for each claim, and in each forum, Plaintiffs have requested and received discovery responses from Ford.

In this State Court Action, Plaintiffs have perpetuated workplace discovery identical to the discovery served in the Workers' Compensation Claim. This includes written discovery, a corporate deposition, and a request to inspect the Claycomo facility again. Only the Labor and Industrial Relations Commission ("LIRC"), however, has the exclusive and original jurisdiction over workplace injury claims and the LIRC's jurisdiction extends to discovery. In an attempt to circumvent the exclusive jurisdiction of the LIRC, Plaintiffs argue the discovery is necessary to identify "John Doe" defendants. This cannot be the case since Plaintiffs' have already obtained the discovery, identified all possible "John Doe" defendants, and sued those "John Doe" defendants in the Federal Action.

Plaintiffs also served broad discovery in this State Court Action that is not related to the products or issues in the case. For example, Plaintiffs request information requiring a review of all workers' compensation claim files for Ford's entire corporate history, without any geographic or time limitations. Plaintiffs also request information and documents regarding every product containing asbestos fibers that was ever manufactured, sold, or distributed by Ford for as long as the company has been in existence (102 years). Plaintiffs argue that the discovery is not overbroad or burdensome. Yet, their own arguments prove otherwise. Despite Ford's objections and controlling caselaw to the



contrary, Respondent ordered the discovery in its entirety. This is the epitome of a discovery order requiring prohibition relief.

## **JURISDICTIONAL STATEMENT**

This original proceeding in prohibition is filed by relator, Ford Motor Company, pursuant to Rules 84.22 – 84.28 and 97.01 – 97.07 of the Missouri Rules of Civil Procedure. A Petition for Writ of Prohibition was filed in the Missouri Court of Appeals for the Western District, and was denied. A Petition for Writ of Prohibition was then filed in this Court, and a Preliminary Writ of Prohibition was granted on November 23, 2004. Exhibit A. This Court has jurisdiction to make its writ absolute pursuant to Mo. Const. art. V, § 4; RSMo. §§ 476.070 & 530.020.

Ford, a defendant in the underlying action, received certain discovery requests from Plaintiffs to which Ford answered in part and objected in part. On September 6 and 7, 2004, Respondent, the Honorable W. Stephen Nixon, entered Orders compelling Ford to answer the objectionable discovery in its entirety by September 27, 2004 or be subject to sanctions under Supreme Court Rule 61.01(b) and (d). Exhibit B.

## STATEMENT OF THE FACTS

Roy L. Dietiker began his employment with Ford in 1962. Exhibit C, 88:4-6. He worked at the Claycomo facility in Kansas City, Missouri, and eventually retired in 1996. Exhibit C, 43:24-25. In addition to alleged exposure to asbestos at work, Mr. Dietiker alleges he purchased and personally owned the following Ford vehicles: a 1959 English Ford Perfect, a 1963 Ford Fairlane wagon, a 1968 Ford Cortina, a 1973 Ford Torino wagon, a 1979 Ford Fairmont wagon, a 1982 Ford F150 truck, a 1988 Ford Mustang convertible, and a 1993 Ford F150 truck. Mr. Dietiker allegedly performed maintenance work during his leisure time, including replacing brake pads when necessary, on six of those vehicles.

### *The Federal Action*

In February of 2001, Mr. Dietiker was diagnosed with mesothelioma. Shortly thereafter, on June 5, 2001, Mr. Dietiker and his wife, Priscilla Ruth Dietiker (“the Dietikers”), filed a lawsuit in federal court. Exhibit D (Dietiker, et al. v. United States Gypsum, et al., Case No. 01-00587-FJG). Although plaintiffs represented to this Court in their Opposition to the Preliminary Writ of Prohibition (“Opposition”) that the Federal Action was “based upon exposures to asbestos prior to the decedent’s work at Ford or elsewhere” and “none” of the named defendants in the Federal Action “were understood to have supplied asbestos to Ford,” Exhibit E, p. 27, the actual allegations in the Federal Action are contrary. The Dietikers, in fact, allege that “in the normal course of his employment and his home life (during the entire time he lived and worked in Missouri – *i.e.* at Ford), Roy Dietiker was exposed to asbestos and/or asbestos-containing materials

that were mined, mixed, manufactured, processed, imported, converted, compounded, rebranded, used or sold by Defendants.” Exhibit D ¶¶ 2, 3 & 9 (emphasis added).

Apparently recognizing workers’ compensation as the exclusive remedy for workplace injuries, the Dietikers did not name Ford in the Federal Action. Instead, they named United States Gypsum, Federal-Mogul Corporation, TAF International, Ltd., T&N PLC, and ACandS, Inc. The Dietikers also sued “John Doe” Defendants 1-20. Id. Ultimately, all of the named defendants in the Federal Action declared bankruptcy. Exhibit F, 7:17-21. However, the case has not been dismissed and the claims against “John Doe” Defendants 1-20 remain pending in the Federal Action.

### ***Discovery of Ford in the Federal Action***

Although Ford was not named as a party in the Federal Action, the Dietikers, through their counsel Steven E. Crick, sought third-party discovery from Ford, including extensive discovery regarding the nature and conditions of Mr. Dietiker’s employment and exposure to asbestos at Ford’s Claycomo facility. On July 10, 2001, within weeks of the filing of the Federal Action, the Dietikers served a subpoena duces tecum on Ford requesting:

1. Any records concerning or relating to the employment of Roy Dietiker, Social Security Number 488-34-9985.
2. All documents concerning or relating to the content of paint used by Mr. Dietiker while employed at Ford and all documents concerning hazard or safety of such paint.

3. All documents concerning or relating to the presence of asbestos at the Ford Motor Company plant in Claycomo, Missouri including building inspection reports, bulk sample analyses, air sample reports, asbestos abatement records, operations and maintenance reports.
4. All documents concerning or relating to the original construction of the Ford plant in Claycomo, Missouri, records of remodeling of the plant prior to 1980, all records concerning the ovens used to dry paint on new cars.
5. Any NIOSH, OSHA or Missouri Department of health studies or other document concerning the Ford Motor Company plant in Claycomo, Missouri.
6. A schematic drawing or blueprint that indicates the area where Mr. Dietiker worked at the Ford Motor Company plant in Claycomo, Missouri.
7. A schematic drawing or blueprint(s) which indicate the areas in Claycomo plant in which asbestos products were located during the period when Mr. Dietiker was an employee of Ford Motor Company.

Exhibit G. Ford produced documents in response. See Exhibit H. Then, on October 16, 2001, the Dietikers issued another subpoena to Ford, along with multiple attachments, that requested the following:

1. [R]ecords concerning any construction in the paint booth, oven and the paint and oil mix room; any records concerning maintenance on pipes in

those rooms; records concerning asbestos abatement in those rooms; any notices provided to Roy Dietiker concerning asbestos at Claycomo; any masks or hoods, or exemplars, provided to Mr. Dietiker for his work at Claycomo; [and] copies of any records concerning OSHA inspections or citations at Claycomo, which may concern or relate to the rooms in which Mr. Dietiker worked as described above, or in any way concerning asbestos.

2. Please produce Claycomo plant for inspection as requested in the attached letter dated September 10, 2001.
3. All records concerning construction or renovation projects at the Claycomo plant performed by or with A.D. Jacobson Co., Inc. between 1950 and 1995.
4. All records concerning purchase of pipe insulation and oven insulation for use at the Claycomo plant between the years 1957 and 1977.
5. Any general files concerning ACandS, Inc. and/or Armstrong World Industries, Inc.

See Exhibit I.

Ford responded to the October 16, 2001 subpoena by referring to the documents produced in response to the July 10, 2001 subpoena duces tecum as well as providing the following materials:

- Maintenance records from the Kansas City Assembly Plant;

- Annual Reassessment of Asbestos-containing Materials at the Kansas City Assembly Plant performed by Clayton Environmental Consultants; and
- OSHA citation regarding asbestos.

See Exhibit H. Ford further responded that, after performing a duly diligent search and inquiry, it could not locate records or materials concerning:

- the construction in the paint booth, oven or the paint and oil mix room;
- notices provided to Mr. Dietiker concerning asbestos at the Kansas City Assembly Plant;
- the purchase of pipe insulation and oven insulation for use at the Kansas City Plant between the years 1957 and 1977; and
- exemplars of masks or hoods.

See id. Plaintiffs' counsel and expert also requested and were permitted to inspect the Claycomo facility as well as to take still photographs and asbestos samples of areas in which Mr. Dietiker worked.

Not satisfied with the extensive discovery received from Ford, the Dietikers filed a Motion to Compel in the Federal Action. Nowhere in the Motion to Compel did the Dietikers mention "John Doe" defendants or any need to identify "John Doe" defendants as part of the discovery to Ford. Exhibit J. Ford responded to the Motion and attached an affidavit from the Kansas City Assembly Plant (Claycomo facility) Engineering Manager detailing his search for responsive materials. See Exhibit K. The Engineering Manager made clear that there were no more documents or materials regarding the installation,

maintenance or removal of asbestos from Mr. Dietiker's workplace. As a consequence, the parties resolved the discovery dispute and the federal court denied the Dietikers' Motion to Compel as moot. See Exhibit L.

### ***The Workers' Compensation Claim***

On July 23, 2001, one month after filing the Federal Action, Mr. Dietiker, through counsel Steven E. Crick, filed a claim with the Missouri Department of Labor and Industrial Relations, Division of Workers' Compensation, for workers' compensation benefits. Exhibit M (Dietiker v. Ford Motor Co., Injury No. 01-075145). In his Workers' Compensation Claim, Mr. Dietiker alleges he was exposed to asbestos while working as an employee of Ford. The claim is still pending.

### ***Discovery of Ford in the Workers' Compensation Claim***

Utilizing the discovery procedures available before the Division of Workers' Compensation, Mr. Dietiker, through counsel Steven E. Crick, issued to Ford a subpoena duces tecum for deposition and requested the following documents and materials:

1. **Any records concerning or relating to the employment of Roy Dietiker, Social Security Number 488-34-9985 not previously produced to the Dietikers in this or any other asbestos action.**  
Mr. Dietiker was an employee at the Ford plant in Claycomo, Missouri.
2. All x-rays, x-ray reports or other record concerning physical examination or treatment of Roy L. Dietiker.



3. All records concerning construction and remodeling of the areas of the Claycomo plant where Roy Dietiker worked including all paint and paint mix areas.
4. All documents concerning the oven burners in the paint booth areas and also the paint ovens where the paint is baked onto the vehicles in both the passenger area, the commercial paint area which was in use up to around 1985 and the commercial/SUV paint area in use today. This includes records of purchase and/or construction of the oven burners and/or ovens, maintenance of same, asbestos surveys or tests concerning same and asbestos removal from same.
5. Any plant layouts which show the plant as it existed in 1960, 65, 70, 75, 80, 85, 90 and current.
6. Any plant layouts or diagrams which show the areas in which asbestos-containing materials were sampled for the 1985 and 1989 Clayton Environmental Asbestos Surveys and any plant layouts or diagrams which show areas where asbestos is located today.
7. All documents pertaining to or relating to the creation of the September 5, 1984 Inter Office memo from Mary Ann Livernois to S.J. Kuritz, D.S. Sugano, F.V. Viola, III, M.D. regarding "mesothelioma deaths."
8. All documents concerning or relating to the May 25, 1978 Inter Office memo from F.X. Scott to Mr. Paul E. Toth and Mr. R.W. Pascoe regarding

- “Dr. Block’s Letter Dated May 2, 1978 Re: Medical Monitoring-Asbestos Exposure.” See, Ex. 1B. The May 2, 1978 letter and any response to the May 25, 1978 Inter Office memo are specifically commanded as well as any other document pertaining thereto.
9. All documents concerning or relating to the February 25, 1980 Inter Office memo from F.X. Scott to Mr. S. Mingela concerning “Asbestos Evaluation – Kansas City Assembly Plant.” See, Exh. 1-C. This includes the letter of Mr. S. Mingela of January 16, 1980 and any response to the February 25, 1980 Inter Office memo as well as any other document pertaining thereto.
  10. All cost estimates, studies of costs, budget requests or applications, minutes or notes of meetings, any correspondence or other document concerning or relating to medical monitoring of Ford employees including, but not limited to those at the Claycomo plant for asbestos exposure or asbestos disease.
  11. All cost estimates, studies of costs, budget requests or applications, minutes or notes of meetings, any correspondence or other document concerning or relating to conducting an asbestos assessment or survey at the Ford Claycomo plant or any other Ford assembly plant.
  12. All cost estimates, studies of costs, budget requests or applications, minutes or notes of meetings, any correspondence or other document concerning or relating to removal of asbestos at the Ford Claycomo plant.

13. Copies of any records concerning the history of Ford's knowledge concerning asbestos which have been produced in other asbestos bodily injury actions.
14. Copies of any records, booklets or other publications concerning the National Safety Council and/or Ford's membership in the National Safety Council.
15. Copies of any records, booklets or other publications concerning the Industrial Hygiene Foundation and/or Ford's membership in the Industrial Hygiene Foundation.
16. The Claycomo Plant for inspection and testing or sampling by outside experts and/or consultants.

Exhibit N (emphasis added). In addition, depositions have been taken and Plaintiffs continue to pursue an additional inspection of the Claycomo facility.

### ***The State Court Action***

Mr. Dietiker passed away on October 7, 2001. On July 14, 2003, nearly two years after filing the Federal Action and the Workers' Compensation Claim, Plaintiffs, represented by the same counsel, Steven E. Crick, filed another lawsuit. Exhibit O. In this case, Plaintiffs filed a Petition in the Circuit Court of Jackson County, Missouri, against Ford, F.X. Scott (an employee at Ford) and "John Does" defendants 1-20. The Petition contains six counts. Four of the counts – Counts I, IV, V, and, in part, Count VI – relate to Mr. Dietiker's alleged exposure to asbestos-containing materials at work ("Work-Related Claims"). The remaining counts – Counts II, III, and, in part, Count VI – relate to

Mr. Dietiker's exposure to asbestos while working at home on his personally owned vehicles ("Brake Claims").<sup>1/</sup> In the words of the Petition itself, the second set of counts relates to Mr. Dietiker's alleged "use[] and replace[ment of] asbestos-containing brakes manufactured by or for Ford on Decedent's own vehicles in eastern Jackson County, Missouri." Id. ¶ 2.d.

On August 28, 2003, Ford filed a Motion to Dismiss the State Court Action, arguing that the Work-Related Claims were barred by the exclusive remedy of workers' compensation. Before Ford's Motion to Dismiss could be heard, Plaintiffs served extensive written discovery and sought to compel the discovery. Exhibit P (discovery requests and responses). Although the only asbestos products claim Plaintiffs allege against Ford involve brake pads installed outside of work on his personal vehicles, Plaintiffs nevertheless requested extensive information and documents about his workplace and each product Ford ever sold "containing asbestos fibers." Exhibit Q (A286-87). A hearing was held on November 13, 2003 regarding the Motion to Dismiss and discovery. Exhibit F, 2:13-21.

During the hearing, counsel for Plaintiffs – who was involved in all the cases/claims filed by the Plaintiffs – admitted the following key points:

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<sup>1/</sup> Not surprisingly, the four counts alleged in the prior Federal Action are nearly word for word identical to the four counts of Work-Related Claims in the State Court Action. Compare Exhibit D, Counts I, II, III and IV of the Federal Action with Exhibit O, Counts II, III, I and VI of the State Court Action, respectively.

- **Plaintiffs had already sought and obtained discovery from Ford in the Federal Action regarding asbestos in Ford’s Claycomo facility where Mr. Dietiker worked. Plaintiffs “learned a great deal about Ford and its knowledge about asbestos at Claycomo specifically.” Id. 7:4-17.**
- **All of the defendants in the Federal Action declared bankruptcy. Id. 7:17-18.**
- **In the Workers’ Compensation Claim, Ford was served a subpoena and produced supplemental documents based on the information learned about asbestos at the Claycomo facility in the Federal Action. Id. 7:25 – 8:3.**
- **The discovery served on Ford in the State Court Action was “virtually the exact same discovery on Ford that had been served on the worker’s compensation claim.” Id. 9:1-3.**

Not one time during the hearing did Plaintiffs’ counsel mention the “John Doe” defendants or any claims or discovery relating to those nominal defendants.

On December 8, 2003, Judge C. William Kramer issued his Order. Exhibit R. With respect to Count I, Judge Kramer found that, because of the exclusive workers’ compensation remedy, the court did not have subject matter jurisdiction and dismissed the count. For Counts II and III, Judge Kramer construed the claims in accordance with Plaintiffs’ argument at the hearing – that Counts II and III relate solely to products purchased from Ford (*i.e.* brakes for his Ford vehicles). Accordingly, those claims were

permitted to proceed along with the part of Count VI (loss of consortium) that relates to those claims. Judge Kramer then found that Counts IV and V related to the workplace. Therefore, the court stayed “all aspects of the case” relating to the claims in Counts IV and V.

In accordance with the trial court’s December 8, 2003 Order, the only claims for which discovery could legitimately proceed are the Brake Claims. As such, Ford has continued in good faith to respond to the discovery for those claims. Ford has provided discovery answers, supplemental discovery answers, and thousands of documents relating to the Brake Claims and brake products. Indeed, during the pendency of Ford’s Petition for Writ of Prohibition in the Court of Appeals and in accordance with the trial court’s Orders, Ford supplemented the discovery on the “Brake Claims” and produced ten banker’s boxes of documents. For the convenience of the Court, attached at Exhibit Q is a chart which summarizes the disputed discovery in this case. By way of summary, Ford disputes the production of documents and information that do not involve and are not reasonably limited to the Brake Claims at issue.

Respondent Judge Nixon was then assigned to the case. Almost nine months after Judge Kramer dismissed or stayed “all aspects of the case” except those related to the Brake Claims, Plaintiffs moved to compel all discovery responses, including discovery on claims barred by the exclusive remedy of workers’ compensation. On September 6 and September 7, 2004 – without explanation – Respondent ordered Ford to answer all discovery, permit another inspection of the Claycomo facility and produce a corporate representative to testify regarding the Claycomo facility within 20 days of the order. The

notice of corporate deposition is identical to the subpoena duces tecum served on Ford in the Workers' Compensation Claim. Plaintiffs even replicated a numbering error in both. Compare Exhibits N and S.

### ***Writ of Prohibition Proceedings***

Before the expiration of the 20 days following Respondent's Order, Ford filed its Petition for Writ of Prohibition in the Court of Appeals. In their Opposition to the Writ of Prohibition, Plaintiffs disputed neither the exclusive remedy of workers' compensation nor the trial court's December 8, 2003 Order dismissing or staying all claims, including all "aspects of the case" except the Brake Claims. Instead, Plaintiffs took a novel tact. Plaintiffs claimed that the workplace discovery in state court is permissible because it purports to seek the identity of the "John Doe" defendants. See Exhibit T. Plaintiffs have taken the same tact in this Court, asserting that the discovery simply "coincidentally" involves discovery of Mr. Dietiker's workplace. See Exhibit E, p. 1.

Plaintiffs also continue to pursue overly broad discovery not related to the Brake Claims or any product with which Mr. Dietiker had contact. Plaintiffs call the discovery "specific discovery." Id., p. 2. It is not. To exemplify Plaintiffs' requests, Ford highlighted just two of them in its Petitions for Writ of Prohibition: a document request requiring a search of all workers' compensation files in the history of Ford, and an interrogatory requesting comprehensive information on every product containing asbestos fibers ever sold by Ford in its history, worldwide.

## **POINTS RELIED ON**

- I. Relator is Entitled to an Order Prohibiting Respondent from Compelling Discovery Responses Regarding Plaintiffs' Work-Related Claims, Because Respondent Does Not have Subject Matter Jurisdiction Over the Work-Related Claims, in that the Labor and Industrial Relations Commission has the Exclusive Jurisdiction.**

State ex rel. McDonnell Douglas Corp. v. Ryan, 745 S.W.2d 152 (Mo. banc 1988)

Strozewski v. Springfield, 875 S.W.2d 905, 907 (Mo. banc 1994)

State ex rel. Lipic v. Flynn, 215 S.W.2d 446 (Mo. 1948)

RSMo. § 287.120(2)

- II. Relator is Entitled to an Order Prohibiting Respondent from Compelling Discovery Responses that are Grossly Overbroad and Unduly Burdensome, Because the Respondent Abused the Discretion Granted for Discovery and Rejected Controlling Law, in that the Ordered Discovery is Without Any Reasonable or Relevant Limitation and Would Result in the Expenditure of Thousands of Hours and Million of Dollars.**

State ex rel. Ford Motor Co. v. Messina, 71 S.W.3d 602 (Mo. banc 2002)

State v. Taylor, 134 S.W.3d 21 (Mo. banc 2004)

State ex rel. Upjohn Co. v. Dalton, 829 S.W.2d 83 (Mo. Ct. App. 1992)

State ex rel. Kawasaki Motors Corp., U.S.A. v. Ryan, 777 S.W.2d 247 (Mo. Ct. App. 1989)





## ARGUMENT

### *Standards for Writ of Prohibition*

A writ of prohibition will issue: (1) to remedy a usurpation of power because of the lack of personal or subject matter jurisdiction; (2) when the trial court has exceeded its jurisdiction or abused its discretion; or (3) under circumstances necessary to avoid irreparable harm. State ex rel. Chassaing v. Mummert, 887 S.W.2d 573, 577 (Mo. banc 1994) (citing State ex rel. Noranda Aluminum, Inc. v. Rains, 706 S.W.2d 861, 862-63 (Mo. banc 1986)). All three apply in this appeal and support an absolute writ of prohibition.

At issue in this appeal are Respondent's Discovery Orders. One of the two most common trial court orders reviewed by way of writ is a discovery order. State v. Larson, 79 S.W.3d 891, 895 (Mo. banc 2002). Indeed, in Messina, 71 S.W.3d at 607, this Court found that "prohibition is the proper remedy for an abuse of discretion during discovery." See also State v. Taylor, 134 S.W.3d 21, 26 (Mo. banc 2004); State ex rel. Lichtor v. Clark, 845 S.W.2d 55, 59 (Mo. Ct. App. 1992).

**I. Relator is Entitled to an Order Prohibiting Respondent from Compelling Discovery Responses Regarding Plaintiffs’ Work-Related Claims, Because Respondent Does Not have Subject Matter Jurisdiction Over the Work-Related Claims, in that the Labor and Industrial Relations Commission has the Exclusive Jurisdiction.**

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**A. Respondent Does Not Have Subject Matter Jurisdiction to Order Discovery of Work-Related Injury Claims.**

Missouri law is clear that work-related injury claims are subject to the exclusive jurisdiction of the LIRC. RSMo. § 287.120(2). In Ryan, 745 S.W.2d at 152, this Court addressed issues nearly identical to those presented in this case. There, as here, a decedent’s relatives filed a wrongful death action based upon certain environmental conditions at his place of employment. Because of the exclusive remedy provided by the workers’ compensation law, the employer in Ryan filed a motion to dismiss for lack of subject matter jurisdiction. The trial court denied the motion and the employer sought a writ of prohibition. This Court issued a writ of prohibition because the trial court did not have subject matter jurisdiction. Id. at 154.

Consistent with Ryan, the trial court in this case held that it did not have subject matter jurisdiction over the Work-Related Claims. In fact, the trial court either dismissed or “stayed all aspects” of the Work-Related Claims. See Exhibit R (emphasis added). Shortly thereafter, however, the case was reassigned. Respondent then de facto reversed the dismissal and stay and ordered Ford to respond to discovery on the Work-Related Claims despite the continued pendency of the Workers’ Compensation Claim.

In compelling discovery regarding the Work-Related Claims, Respondent said nothing about the exclusive jurisdiction of the LIRC. Likewise, Plaintiffs did not contest the issue of subject matter jurisdiction in their Opposition to Ford’s Petition for Writ of Prohibition filed in the Court of Appeals or in this Court. See Exhibits E and T. They simply ignored it. This fundamental requirement cannot be ignored. See Strozewski v. Springfield, 875 S.W.2d 905, 907 (Mo. banc 1994) (“If the trial court lacked subject matter jurisdiction, its proceedings are absolutely void.”).

**1. There must be jurisdiction over the subject matter to order discovery.**

Basic principles of jurisprudence require that a court have subject matter jurisdiction over a claim before proceeding with any aspect of the claim. See Missouri Soybean Assoc. v. Missouri Clean Water Comm’n, 102 S.W.3d 10, 26 (Mo. 2003) (“A court’s authority to adjudicate a controversy is based on three essential elements; the court must have jurisdiction of the subject matter . . . .”). Indeed, it is uniformly held that any action taken without subject matter jurisdiction is void. See, e.g., Strozewski, 875 S.W.2d at 906.

These basic principles are incorporated into the Missouri Rules of Civil Procedure governing discovery. Under the heading “Scope of Discovery,” the Missouri Rules limit discovery to the “subject matter involved in the pending action,” namely the “claim[s] or defense[s]” of the parties to the action. Mo. R. Civ. P. 56.01(b) (emphasis added). In accordance with these principles, there must be jurisdiction over the subject matter to order discovery.

**2. The LIRC has jurisdiction to order discovery of work-related injury claims.**

The LIRC not only has the exclusive subject matter jurisdiction of work-related injury claims, but also has express jurisdiction for the conduct of discovery to effectuate that exclusive jurisdiction. See RSMo. § 287.560. A claimant before the LIRC can take depositions, request documents and make inspections. Id. Utilizing the discovery procedures available before the LIRC, Mr. Dietiker, through counsel Steven E. Crick, issued to Ford a subpoena duces tecum for deposition and requested documents and an inspection of the Claycomo facility. Mr. Dietiker has also taken depositions in the Workers' Compensation Claim.

Notably, the subpoena duces tecum served on Ford in the Workers' Compensation Claim requests "[a]ny records concerning or relating to the employment of Roy Dietiker . . . not previously produced to the Dietikers in this or any other asbestos action." Exhibit N. The remaining discovery requests in the Workers' Compensation Claim are identical to discovery requests in the State Court Action and are substantially similar to the discovery sought in the Federal Action. Plaintiffs admitted that Ford responded to the discovery requests in the Workers' Compensation Claim. Accordingly, Plaintiffs have obtained the work-related discovery in the forum having exclusive subject matter jurisdiction.

**3. Exclusive jurisdiction of workers' compensation claims in the LIRC precludes discovery in State Court on those very same claims.**

The underlying purpose of the workers' compensation law and the policy favoring liberal construction is to compensate employees for work-related injuries and to avoid the harassment and inconvenience associated with attempts to recover in a civil action. Landman v. Ice Cream Specialties, Inc., 107 S.W.3d 240, 252 (Mo. 2003) ("The system was enacted to provide quick recovery to those who were injured without their incurring the cost and delay associated with litigation."); overruled in part on other grounds Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003). Permitting a party to proceed in state court with discovery on claims that are exclusively subject to the jurisdiction of the LIRC, and in which they have already obtained the discovery, would defeat the purpose of the workers' compensation system and subject employees and employers to the same burdens in a civil action as if Missouri did not provide for the exclusivity of the workers' compensation remedy.

In State ex rel. Lipic v. Flynn, 215 S.W.2d 446 (Mo. 1948), this Court issued a Writ of Prohibition in a case in which parallel actions were brought in probate court and circuit court, prior to the reorganization of Missouri's court system, involving the same issues and seeking the same relief. Id. at 451. The Flynn Court held that the "circuit court is encroaching on the jurisdiction of the probate court, which is summary and exclusive, on what really is the same cause of action." Id. Thus, a Writ of Prohibition was issued.

Similarly, it is "clearly against the logic of the circumstances" to permit the work-related discovery to proceed in this State Court Action and to thereby encroach on the exclusive jurisdiction of the LIRC. Messina, 71 S.W.3d at 607. Otherwise, Ford would receive no relief from a workers' compensation system that was created to remove the

costs and delays associated with litigation, and judicial resources would be wasted. See Landman, 107 S.W.3d at 252.

Under the authority of Ryan and Flynn, as well as the basic principles of law requiring subject matter jurisdiction before proceeding with any aspect of a claim, a writ of prohibition should issue to reverse the Respondent's de facto assumption of jurisdiction over the Work-Related Claims for which the trial court unquestionably has no subject matter jurisdiction.

**B. Workplace Discovery Purported to Identify “John Doe” Defendants is Contrary to Law and Patently Misleading.**

To try to circumvent the fatal reality of the trial court's lack of subject matter jurisdiction on the Work-Related Claims, Plaintiffs contend that the requested discovery is not actually for the “Work-Related Clams” that have been dismissed or stayed, but instead to identify the “John Doe” defendants. Plaintiffs argue that “the discovery is aimed to locate evidence concerning those John Doe Defendants and assist in answering such general questions as: What asbestos was used at Claycomo? How was it used? Where was it used? Was it used where Decedent could have been exposed? Who manufactured those products?”<sup>2/</sup> Exhibit T, p. 19. Plaintiffs even suggest that they need the discovery to

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<sup>2/</sup> This presents serious issues regarding the jury's ability to discern between evidence of Work-Related Claims against the supposed “John Doe” Defendants and evidence of Work-Related Claims against Ford, which are prohibited.

identify the names of the “John Doe” defendants. Id. Their contention is misleading and “clearly against the logic of the circumstances.” Messina, 71 S.W.2d at 607.

**1. Plaintiffs already obtained discovery and have all the information regarding possible “John Doe” defendants.**

This State Court Action is the third in a line of claims filed by the Plaintiffs. In each case, the Plaintiffs have sought the same discovery from Ford. In fact, during the hearing on the motion to dismiss and for discovery in this State Court Action, Plaintiffs admitted that:

- **Plaintiffs had already sought and obtained discovery from Ford in the Federal Action regarding asbestos in Ford’s Claycomo facility where Mr. Dietiker worked. Plaintiffs “learned a great deal about Ford and its knowledge about asbestos at Claycomo specifically.” Exhibit F, 7:4-17.**
- **In the Workers’ Compensation Claim, Ford was served a subpoena and produced supplemental documents based on the information learned about asbestos at the Claycomo facility in the Federal Action. Id. 7:25 – 8:3.**
- **The discovery served on Ford in the State Court Action was “virtually the exact same discovery on Ford that had been served on the worker’s compensation claim.” Id. 9:1-3.**

Plaintiffs have also inspected the Claycomo facility and tested for asbestos. Furthermore, among many other documents and information received in the Federal Action



(over three years ago) Plaintiffs were provided annual reassessments of asbestos-containing materials at the Claycomo facility, an OSHA citation regarding asbestos, and the names of third parties that performed construction and maintenance on the Claycomo facility. Indeed, even in this appeal, at the same time Plaintiffs claim the need to discover the identity of “John Doe” defendants, they submit lists of products to this Court that identify the names of potential “Joe Doe” defendants – numerous producers and manufacturers of asbestos products supplied to Ford. See Opposition Exhibits J, L, M, R and NN.

The fallacy of Plaintiffs’ “John Doe” argument is further demonstrated by their own discovery. For example, Plaintiffs’ corporate representative deposition in this State Court Action is word for word the same as the subpoena duces tecum Plaintiffs issued to Ford in the Workers’ Compensation Claim. Compare Exhibits N and S. How can the same requests issued to the same party yield any information different from that yielded in the Workers’ Compensation Claim? They cannot. Plaintiffs have the information they are allegedly seeking. And, notably, even after all of this, they have never substituted even one party for a “John Doe” defendant in the Federal Action or this State Court Action.

**2. The “John Doe” defendants are already named in the Federal Action and Plaintiffs are merely attempting to make an end run around the LIRC.**

In the Federal Action, Plaintiffs sued all of the companies that designed, manufactured, distributed, sold or installed asbestos or asbestos-containing products in Mr. Dietiker’s workplace. Exhibit D, ¶¶ 2, 3 & 9. These companies included United States

Gypsum, Federal-Mogul Corporation, TAF International, Ltd., T&N PLC, ACandS, Inc. and “John Doe” Defendants 1-20.

Ultimately, the named defendants in the Federal Action went bankrupt, but not before Plaintiffs obtained extensive discovery. Indeed, discovery directed to Ford in the Federal Action even identified names of third parties that are potential “John Doe” defendants. See Exhibit I. Thus, well before the filing of this State Court Action Plaintiffs knew about—and named—the companies that allegedly manufactured, sold, distributed and installed asbestos in Mr. Dietiker’s workplace.

Yet, although “John Doe” defendants were named in the Federal Action nearly four years ago and in this State Court Action over a year and a half ago, not one has been substituted with a real party.<sup>3/</sup> The reason no “John Doe” defendants have been substituted in any case is because there are no “John Doe” defendants—other than those named defendants in the Federal Action. Thus, the very first action filed by the Dietikers, the Federal Action, was actually against defendants who are in reality the “John Doe” defendants in this State Court Action.

From these circumstances, the inescapable conclusion is that Plaintiffs are not pursuing the work-place discovery in the State Court Action to obtain information about

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<sup>3/</sup> In circumstances where “John Doe” defendants have not been timely substituted, courts have routinely dismissed the “John Doe” defendants. See, e.g., Kenning v. Carter, 216 F. Supp. 2d 856, 858 (S.D. Ind. 2002) (citing cases regarding the temporary use and dismissal of “unnamed” defendants).

the identity of the “John Doe” defendants. After all, they are known, they were joined as parties to the Federal Action and are now all bankrupt. If “John Does” were truly the target of Plaintiffs’ interest, they would have pursued them in the Federal Action and named the parties identified during discovery in the Federal Action.

**3. Neither Respondent nor Plaintiffs ever mentioned or discussed the claims or discovery for the “John Doe” claims.**

Until very recently, this State Court Action has been about Ford and Ford employee F.X. Scott. Thus, the trial court correctly held that the Work-Related Claims are within the exclusive jurisdiction of the LIRC. Importantly, the trial court said nothing about the “John Doe” defendants in its Discovery Orders. Furthermore, at no time during the hearing on the motion to dismiss and discovery held on December 8, 2003, did Plaintiffs’ counsel ever mention or argue anything regarding the “John Doe” defendants or the need for discovery regarding the “John Doe” defendants. Additionally, Plaintiffs made no such argument in the Federal Action – a case in which “John Doe” Defendants 1-20 were also named. The reason for this is simple – Plaintiffs do not care one whit about the “John Doe” defendants because they are already known to Plaintiffs, they were already joined in the Federal Action and are now all bankrupt.

The issue of asbestos materials and records at the Claycomo facility was also previously the subject of a Motion to Compel in the Federal Action. Cf. Messina, 71 S.W.3d at 608 (recognizing discovery from prior cases as a means to avoid the burden of discovery). Nowhere in the Motion to Compel did the Dietikers mention “John Doe” defendants or any need to identify “John Doe” defendants as part of the discovery to Ford.

Furthermore, Ford responded to the Motion and attached an affidavit from the Engineering Manager of the Claycomo facility detailing his search for responsive materials. See Exhibit K. The Engineering Manager made clear that after a diligent search there were no more documents or materials regarding the installation, maintenance or removal of asbestos from Mr. Dietiker's workplace. In other words, there are no more documents that would identify "John Doe" defendants. The parties then resolved the discovery dispute and the federal court denied the Dietikers' Motion to Compel as moot.<sup>4/</sup> See Exhibit L. Yet, Plaintiffs continue to pursue discovery from Ford of the Work-Related Claims.

Plaintiffs' attempt to circumvent the exclusive jurisdictional bar so as to pursue discovery solely for their dismissed/stayed claims against Ford should not be countenanced. Permitting a party to disguise the discovery of Work-Related Claims as discovery to identify "John Doe" defendants is "clearly against the logic of the circumstances, is arbitrary and unreasonable, and indicates a lack of careful consideration."

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<sup>4/</sup> The issue of discovery for "John Doe" defendants that manufactured, provided, installed or disturbed asbestos material in Mr. Dietiker's workplace has already been considered and resolved in the Federal Action. Consistent with principles of comity between courts with concurrent jurisdiction, Plaintiffs should not be permitted to revisit the issue in this State Court Action. See State ex rel. General Dynamics Corp. v. Luten, 566 S.W.2d 452 (Mo. banc 1978) ("The law is well settled that the jurisdiction of a court first invoked cannot be defeated by a subsequent proceeding in a court having concurrent jurisdiction of the person or subject matter.").

Messina, 71 S.W.2d at 607 (emphasis added). The harm to Ford will likewise be irreparable. Larson, 79 S.W.3d at 894.

Based on the lack of subject matter jurisdiction, the impermissible attempts to circumvent the exclusive jurisdiction of the workers' compensation laws, and the attendant unnecessary and irreparable harms, Ford requests an order prohibiting discovery regarding the Work-Related Claims. For the convenience of the Court, Exhibit Q sets forth the discovery that should be so limited.<sup>5/</sup> Accordingly, this Court should make absolute its preliminary writ and order Respondent to vacate his September 6 and 7, 2004 Discovery Orders, thereby prohibiting discovery on work-related issues, including a second inspection of the work site and corporate deposition.

**II. Relator is Entitled to an Order Prohibiting Respondent from Compelling Discovery Responses that are Grossly Overbroad and Unduly Burdensome, Because the Respondent Abused the Discretion Granted for Discovery and Rejected Controlling Law, in that the Ordered Discovery is Without Any Reasonable or Relevant Limitation and Would Result in the Expenditure of Thousands of Hours and Million of Dollars.**

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<sup>5/</sup> Plaintiffs' request to inspect the Claycomo facility (No. 16 of Plaintiffs' First Special Requests for Production) should be denied because Plaintiffs and their counsel have already had an opportunity to inspect the facility. See Messina, 71 S.W.3d at 608 (prohibiting discovery because the plaintiffs had the discovery from a prior case).

Even if Plaintiffs were permitted to circumvent the exclusive jurisdiction of workers' compensation to obtain discovery of Work-Related Claims, a writ of prohibition is equally important in this case to remedy the discovery that is grossly overbroad and burdensome. Ford seeks relief, for example, from ordered discovery requiring a review of all workers' compensation files in Ford's 102 year history as well as ordered discovery requiring comprehensive information regarding every product ever sold by Ford worldwide in its entire history containing asbestos fibers.

**A. Discovery Must Have Some Reasonable or Relevant Limit.**

The trial court has the affirmative duty and obligation to "prevent the subversion of pre-trial discovery into a war of paper." State ex rel. Upjohn Co. v. Dalton, 829 S.W.2d 83, 85 (Mo. Ct. App. 1992). If the trial court fails in this obligation, and thereby abuses its discretion during discovery, "[p]rohibition is the proper remedy." Messina, 71 S.W.3d at 607.

In State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001), this Court held that prohibition may be appropriate to prevent an abuse of discretion that causes "unnecessary, inconvenient, and expensive litigation." A trial court also abuses its discretion when its order is "clearly against the logic of the circumstances, is arbitrary and unreasonable, and indicates a lack of careful consideration." Messina, 71 S.W.3d at 606; see also Taylor, 134 S.W.3d at 26; Lichter, 845 S.W.2d at 59.

Respondent ordered discovery regarding issues and products that far exceed the issues in the case. The result is a war of paper which is not only unnecessary,

inconvenient and monumentally expensive to Ford, but also directly contrary to controlling caselaw, including Missouri Supreme Court precedent.

**B. Controlling Precedent Limits Discovery to Issues and Products in the Case.**

Missouri Courts regularly issue writs of prohibition when the ordered discovery is overbroad, burdensome and oppressive. See, e.g., Messina, 71 S.W.3d at 602; State ex rel. Pierson v. Griffin, 838 S.W.2d 490, 493 (Mo. Ct. App. 1992); State ex rel. Wilson v. Copeland, 685 S.W.2d 252, 253 (Mo. Ct. App. 1985); State ex rel. Kawasaki Motors Corp., U.S.A. v. Ryan, 777 S.W.2d 247, 251 (Mo. Ct. App. 1989). Courts have also issued writs of prohibition for discovery unrelated to the claims in a case. See, e.g., Dalton, 829 S.W.2d at 85 (finding discovery constituted “fishing expedition” and issuing writ of prohibition); State ex rel. Anheuser v. Nolan, 692 S.W.2d 325 (Mo. Ct. App. 1985) (finding that discovery sought was clearly beyond the scope of discovery because it had no relevance to the issues involved in the claim and was merely “fishing expedition”).

In Messina, 71 S.W.3d at 602, this Court held that the “discovery process was not designed to be a scorched earth battlefield upon which the rights of the litigants and efficiency of the justice system should be sacrificed to mindless overzealous representation.” Id. at 606. This Court in Messina further established the controlling precedent for this case: discovery of different and unrelated products is improper. Id. at 608. Despite repeated citations by Ford to this controlling caselaw, Plaintiffs have not even mentioned Messina.

Much like the holding in Messina, the court of appeals in Dalton, 829 S.W.2d at 85, held that discovery requests are overly broad when they seek documents related to products other than those at issue and are not limited to a particular period of time. Id. at 85; see also Griffin, 838 S.W.2d at 493 (holding the trial court exceeded its jurisdiction by ordering discovery not confined to relevant information concerning the injuries which the parties are claiming, nor limited in relevant time frames). In short, the requests went beyond a mere fishing expedition and “seem designed to ‘drain the pond and collect the fish from the bottom.’” Dalton, 829 S.W.2d at 85 (quoting In re IBM Peripheral EDP Devices Antitrust Litig., 77 F.R.D. 39, 42 (N.D. Cal. 1977)).

Courts not only recognize that discovery of unrelated products should be prohibited, see, e.g., Messina, 71 S.W.3d at 608 (Mo. banc 2002) (discovery of different and unrelated products is improper), but courts also recognize the extreme burden and unreasonableness of unrelated products’ discovery. See, e.g., Kawasaki, 777 S.W.2d at 251.

In Kawasaki, the plaintiff brought an action relating to injuries from a particular model of Kawasaki all-terrain vehicles. The plaintiff filed discovery requests addressing all models of all-terrain vehicles manufactured by Kawasaki and the trial court compelled responses. The court of appeals issued a writ of prohibition because the discovery was defectively overbroad, oppressive, burdensome, and intrusive. Id. at 252. The court noted that some of the requests were not limited to the models at issue, some were not limited in time, some were overbroad and vague and still others were not limited to the same or similar circumstances of the accident at issue. Id.; see also Nolan, 692 S.W.2d at 325 (issuing writ of prohibition when discovery was clearly beyond the scope of



discovery in that it sought material with no relevance to the issues involved). The discovery requests in this case are likewise overbroad and burdensome because they are not limited in time or scope or to relevant issues in the case, including the alleged products at issue.

**C. The Ordered Discovery Spans the Entire History of Ford and Covers Thousands of Products.**

This case involves limited claims over discrete periods of time. Plaintiffs' only claims – the Brake Claims – involve, at most, six vehicles and a limited number of products for those vehicles. Yet, Plaintiffs requested, and Respondent ordered, discovery that spans the entire 102-year history of Ford, as well as thousands of unrelated products. It is impractical to set forth all of the discovery requests at issue. For the convenience of the Court, attached as Exhibit Q is a summary of requests which are the subject of this Petition for Writ of Prohibition. Two examples vividly demonstrate the need for prohibition relief.

**1. Request No. 6 is grossly overbroad and burdensome and alone would require thousands of hours and no less than \$2,753,600.**

Request No. 6 in Plaintiffs' First Uniform Request for Production of Documents seeks "[a]ll workers' compensation files of employees of this defendant or its contracting divisions, subsidiaries or predecessor corporations, who have made a claim that he or she had contracted an asbestos-related disease or disability." Not only does this discovery deal with Work-Related Claims (for which the trial court has no jurisdiction), but, also, the request is without any temporal or geographic limitation and violates the reasonable expectations of privacy of non-party employees. See State ex rel. Crowden v.

Dandurand, 970 S.W.2d 340, 342 (Mo. 1998). The resulting burden to Ford and the invasion of privacy are extreme.

Ford's workers' compensation files are not stored in one centralized location. They are stored in several different corporate locations throughout the United States. Exhibit U, ¶ 7. Files are located in multiple locations, including: (1) Ford's World Headquarters building in Dearborn, Michigan; (2) Ford's Workers' Compensation Norwood Facility located in Melvindale, Michigan; (3) Ford's offsite storage warehouse in Highland Park, Michigan; and (4) each of Ford's individual plants and facilities across the United States. Id.

The workers' compensation files are not indexed by disease or injury type, but, rather, are organized only by employee name or employee number. The files are also not indexed by job description or category; they, again are organized by employee name or employee number. There is no computerized database of all workers' compensation claim information that would allow retrieval of all the information sought by Plaintiffs in the request. While there is a database of workers' compensation claims beginning in 1988, whether the general comment field of the database contains information about an asbestos-related injury is dependent on the person entering the information. Id. ¶ 9. In order to fully respond to the broad order of Respondent, any search of the files must be conducted by manually reviewing each workers' compensation file one by one. Id. ¶¶ 8-9.

Ford's offsite Highland Park storage warehouse alone contains approximately 6,884 boxes of files that could possibly relate to information sought in Request No. 6. This is in addition to the thousands of files located elsewhere throughout the United States. Id.

¶¶ 7, 12 and 13. Thus, there are likely tens of thousands of workers' compensation files to be manually reviewed in order to respond to the request for production. Such a manual review of tens of thousands of files would be labor-intensive, time-consuming, and expensive. In addition, Ford would also need to undertake the burden of conducting a privilege review of the material found within the tens of thousands of files, resulting in further time spent and costs. Id. ¶ 11. The files would also include irrelevant time periods and locations.

Based on established document review metrics, one person can review approximately one box of file records for content and privilege in one day. Given this metric, it would take 40 people working full-time (40 hours per week) approximately 173 days to review the approximately 6,884 boxes of workers' compensation claims files that are located at Ford's offsite storage alone. Ford could retain temporary contract document reviewers skilled in medical and legal file review to aid in the file review and required categorization of documents at a rate of approximately \$50.00/hour, which would result in a total cost to Ford of approximately \$2,753,600 to conduct the review of the Highland Park files alone. Id. ¶ 12; Exhibit V, ¶¶ 5-6.

These very points were raised in a similar proceeding recently in the Texas Court of Appeals. The court in In re Sears, Roebuck and Co. and In re Ford Motor Co., Nos. 09-04-337CV and 09-04-338CV, held that the exact same unlimited discovery request for workers' compensation files was "not narrowly tailored" and simply constituted a "fishing expedition." Exhibit W. The request was therefore denied and the Texas court issued a writ prohibiting the discovery.

Plaintiffs have argued to this Court that Ford is in fact “not overly burdened by having to search computer databases” for all of the workers’ compensation files. See Exhibit E, p. 43. This misconstrues the facts. The discovery request at issue is not simply limited to a computer search of the limited database; it requests “[a]ll workers’ compensation files of employees of this defendant or its contracting divisions, subsidiaries or predecessor corporations, who have made a claim that he or she had contracted an asbestos-related disease or disability.” Exhibit Q, (A291). Ford cannot rely on a search of the limited information contained in the computer database to fully respond to this extremely broad request and order.<sup>6/</sup>

By arguing Ford is not overly burdened by searching a computer database, Plaintiffs appear implicitly to recognize that anything other than a computer search of the tens of thousands of workers’ compensation files would be overly burdensome. Indeed, Plaintiffs do not dispute that a manual review of all the workers’ compensation files would be necessary to comply fully with the order and would take tens of thousands of hours and millions of dollars to complete.<sup>7/</sup> Thus, the burden and expense remain extreme and

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<sup>6/</sup> Even if Plaintiffs agreed that whatever information is revealed by a word search of the database will satisfy this request, the request still has no temporal or geographic limitations and is “work-related” discovery that is irrelevant to the product liability claims against Ford and therefore outside the jurisdiction of the trial court.

<sup>7/</sup> In their Opposition, Plaintiffs attempt to suggest an improper purpose based on the limitations of the database. However, the database was not created for Plaintiffs’ counsel’s

unreasonable and there is no way that Respondent's Discovery Orders can be reviewed on appeal before Ford is required to expend tens of thousands of hours and millions of dollars **(no less than \$2,753,600 to complete only a portion of the search)**.

**2. Interrogatory No. 5 would require review of tens of thousands of models, parts and components.**

Interrogatory No. 5 in Plaintiffs' First Uniform Interrogatories seeks comprehensive information regarding every product containing asbestos fibers ever sold in the entire history of Ford worldwide. Since 1960 alone, Ford has manufactured, at a minimum, over 40 different vehicle lines, which equates to hundreds of different vehicle models/model year combinations over that 45 year time period. Each vehicle model (and model year) uses component parts different from other vehicle models (and model years). As a result, there are tens of thousands of individualized vehicle component configurations. Respondent's Discovery Orders in this case require Ford to search for and produce information and documents relating to thousands of different component parts in all Ford vehicles since 1903, despite the fact that Mr. Dietiker never had any contact or exposure to most all of those components. As explained in more detail below, by way of an example with respect to the search for brake lining information on a discrete population of vehicles, Respondent's Discovery Orders are oppressive and would result in many months (or years)

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convenience, but for Ford's business purposes; namely, the database was created to track individual workers' compensation claims to completion. Accordingly, the files are organized by name.

of work at a substantial financial cost to Ford and amount to nothing more than a fishing expedition by Plaintiffs. Exhibit X, ¶ 5.

To search for information concerning asbestos-containing brake linings, for example, Ford would need to undertake a time-intensive manual review of detailed engineering information for each vehicle model and model year. To identify the vehicle model and vehicle model years, Ford must manually review the resident engineer books, illustration drawings, illustration sketches or the equivalent, to identify the base part numbers for the assembly of the brake system for each and every vehicle model and model year.<sup>8/</sup> Upon identification of those component base part numbers of the brake assemblies that were used for any given vehicle model or model year, Ford would then be required manually to pull each and every assembly drawing for the base component part of the brake assembly for every vehicle model and model year. Id. ¶¶ 5-6.

Upon identification of the assembly drawings for the base component part for the brake assembly, Ford would then have to manually review each and every drawing to identify the base component part numbers for the brake lining, or the name of the supplier

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<sup>8/</sup> While Ford specified the material characteristics for the brake linings, Ford suppliers do not provide Ford with the composition of materials in the brake linings because of the proprietary nature of this information. Thus, Ford does not have complete information regarding the models and model years that may have contained asbestos in the brake linings. Exhibit X.

who manufactured the brake lining. In some circumstances the part number for the brake linings or the name of the supplier may not even be on the assembly drawing. Id. ¶ 7.

If the supplier name is not on the assembly drawing, which is often the case, Ford would then have to pull the drawing for the brake lining component for each and every vehicle and vehicle model year, and identify the material specification for each and every brake lining component. The material specification will provide a proprietary number for a supplier. Ford would then have to take each proprietary number to its supplier to determine if the supplier has information regarding whether the brake linings may have contained asbestos fibers.

This process is incredibly time and labor intensive and would require several people to work full-time for several months for brake linings only, which is estimated to reach close to 10,000 brake component combinations for the various models and model year configurations from 1960 to the present.

There have been approximately 80 different asbestos-containing vehicle components used by Ford at one time or another in its vehicles. The Discovery Orders entered by the Respondent require Ford to conduct the massive, time-consuming and expensive search and investigation (described above with respect to brake linings only) on each and every one of these eighty different components. This Order is oppressive and would require the expenditure of several months or years to identify all of the responsive information, when the information and documents do not even relate to the components or vehicles at issue. Id. ¶ 11.

In their Opposition, Plaintiffs suggest that this discovery request is not actually burdensome because they have obtained Ford documents setting forth numerous lists of asbestos products. Far from proving the discovery reasonable, this argument actually recognizes the extreme burden of the discovery. A simple count of the parts on the limited lists Plaintiffs attach to their Opposition alone adds up to approximately 624 parts. See Opposition Exhibits J, K, L, and NN. Almost none of these appear to be the brake products to which Plaintiffs claim exposure from changing brakes on personal vehicles outside of work. Yet, Plaintiffs do not simply request a list of every product ever sold containing asbestos fibers. Instead, Plaintiffs seek, and the Respondent Court ordered, the following with respect to each product:

- 5 a. the brand name of each such product and a description of the use anticipated by you for each such product;
- b. the identity of each United States government patent, whether issued or pending, pertaining to such product;
- c. general description of the said product (e.g., size, shape, and color);
- d. describe the type of package(s) in which the product was and/or is contained, give the name of the product appearing on each package, and state the colors on which the package and any writings appeared;
- e. the date that such product first was placed on the market;
- f. the date that asbestos was removed from the product;
- g. the reason such product was removed from the market;
- h. the type of asbestos contained in each such product;



- i. the amount of each type of asbestos in each such product (stated as a percentage of the total solid constituent materials);
- j. the date the product was removed from the market, if it was;
- k. the identity of each and every document relating to the sale, distribution, or use of any such product in the states of Kansas and/or Missouri;
- l. the name(s) and address(es) of each and every person and/or entity to whom any such product was sold and/or delivered in the states of Kansas and/or Missouri together with the date(s) of each such sale and/or delivery;
- m. the precise location(s) in the states of Kansas and/or Missouri to where each or any such product was delivered.

Exhibit Q, (A286-87). Plaintiffs' discovery further requires "[a]ll catalogs, brochures, sales literature, pamphlets, loose-leaf binders, or inventory data sheets" and "[a]ll records, correspondence, invoices, contracts, memoranda, billings and other documents" regarding every product ever sold containing asbestos fibers. Id., (A291).

By attaching lists of numerous products, Plaintiffs simply highlight and implicitly recognize the enormous and unreasonable burden to respond to the ordered discovery for every product. Accordingly, discovery should be limited to the actual products at issue in the case – the brakes for the six vehicles used by Mr. Dietiker.

It is evident, based on a simple review, that Plaintiffs' and Respondent's failure to impose any reasonable or relevant limitation creates discovery requests that are

overbroad, burdensome, oppressive and all but impossible – if not impossible – to complete. The costs and monumental efforts associated with gathering the discovery as ordered is not recoverable on appeal; therefore, Ford would be irreparably harmed without prohibition relief. See State ex rel. Blue Cross and Blue Shield of Mo. v. Anderson, 897 S.W.2d 167, 169 (Mo. Ct. App. 1995).

The discovery requests ordered by Respondent are not only overbroad and unduly burdensome on their face, particularly given the number of component parts, employees and products associated with Ford over its century of existence, but, in practice, the discovery requests would result in an extreme burden to Ford that far outweighs any need and benefit to plaintiffs. See Clark, 845 S.W.2d at 66; see also J.L.M. v. R.L.C., 132 S.W.3d 279, 287 (Mo. Ct. App. 2004) (the court must balance the needs, such as relevancy, with the burden, including costs and interests of privacy). The burden to Ford calculated in the tens of thousands of hours and millions of dollars far outweighs any benefit to plaintiffs, who allege Mr. Dietiker was exposed outside of work to brake pads containing asbestos fibers for six vehicles. This is the very definition of a “scorched earth” approach denounced by this Court in Messina, 71 S.W.3d at 606.

The law, as established by this Court in Messina and further explained in Dalton and Kawasaki, is simple and clear. Respondent did not follow the law. Therefore, this Court should make absolute its preliminary writ of prohibition prohibiting Respondent from compelling discovery that is grossly overbroad and burdensome.

## **CONCLUSION**

For the foregoing reasons, this Court should make its Preliminary Writ of Prohibition absolute, vacate Respondent's September 6 and 7, 2004, discovery orders and limit discovery to those matters not already discovered and that are relevant to the issues in the case.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I hereby certify, pursuant to Missouri Rule of Civil Procedure 84.06(c), that the Brief for Relator Ford Motor Company in the above-captioned appeal complies with the limitations contained in Rule 84.06(b), was prepared using Microsoft Word in 13-point Times New Roman font and contains 10,697 words, from the Table of Contents through the Conclusion, as determined by the Microsoft Word counting system. I also certify that the diskettes of the brief filed with the Court and served on all parties have been scanned for viruses and are virus-free.

\_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing document was mailed via U.S. Mail, on this 21st day of January, 2005, to the following:

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